

1 UNITED STATES DISTRICT COURT

2 DISTRICT OF NEVADA

3 UNITED STATES OF AMERICA,

4 Plaintiff,

5 v.

6 CHARLES BURTON RITCHIE,
7 BENJAMIN GALECKI,

8 Defendants.

Case No.: 2:15-CR-0285-APG-EJY

**Order Denying Renewed Motion for
Judgment of Acquittal**

[ECF Nos. 451, 461]

9 At the conclusion of the Government's case during the trial, the defendants orally moved
10 for judgment of acquittal under Federal Rule of Criminal Procedure 29. I denied the motion and
11 the defendants were convicted of most of the counts. Defendant Benjamin Galecki then filed a
12 renewed motion for judgment of acquittal. ECF No. 451. Defendant Charles Burton Ritchie filed
13 a motion to join in Galecki's motion. ECF No. 461.¹

14 In ruling on a Rule 29 motion, "the relevant question is whether, after viewing the
15 evidence in the light most favorable to the prosecution, any rational trier of fact could have found
16 the essential elements of the crime beyond a reasonable doubt." *United States v. Alarcon-Simi*,
17 300 F.3d 1172, 1176 (9th Cir. 2002). "The government does not need to rebut all reasonable
18 interpretations of the evidence that would establish the defendant's innocence, or rule out every
19 hypothesis except that of guilt beyond a reasonable doubt." *U.S. v. Nevils*, 598 F.3d 1158, 1164
20 (9th Cir. 2010) (citation and internal quotation marks omitted). However, "evidence is

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22 ¹ Ritchie filed one motion for joinder, requesting permission "to join Defendant Galecki's
23 Motion to Set Aside the Verdict, ECF # 450." ECF No. 461. It is unclear whether Ritchie is
referring to Galecki's motion for a new trial (ECF No. 450) or his motion for judgment of
acquittal (ECF No. 451). Out of an abundance of caution, I presume Ritchie intends to join both
motions, and I grant that request.

1 insufficient to support a verdict where mere speculation, rather than reasonable inference,
2 supports the government's case, or where there is a total failure of proof of a requisite element."
3 *Id.* at 1167.

4 The defendants raise a number of issues they believe warrant acquittal. The only one that
5 comes close to meeting the applicable standard is the argument that they cannot be convicted on
6 any of the fraud charges (Counts 9 through 19) because there were no victims who detrimentally
7 relied on any material misrepresentations. ECF No. 451 at 5. The argument has some facial
8 appeal, as it is likely that anyone who purchased the defendants' synthetic cannabinoid products
9 believed they were made for human consumption (and used them as such) despite the warning on
10 the packages that they were not for human consumption.

11 But the defendants' argument is based on the incorrect assumption that the Government
12 must prove that a victim reasonably relied on the defendants' misrepresentations and suffered
13 damages as a result. That is not the case because the mail and wire fraud statutes are different
14 than a common-law fraud claim.

15 [T]he fraud statutes did not incorporate all the elements of common-law fraud.
16 The common-law requirements of "justifiable reliance" and "damages," for
17 example, plainly have no place in the federal fraud statutes. *See, e.g., United*
18 *States v. Stewart*, 872 F.2d 957, 960 (C.A.10 1989) ("[Under the mail fraud
19 *statute,] the government does not have to prove actual reliance upon the*
20 *defendant's misrepresentations."); United States v. Rowe*, 56 F.2d 747, 749
21 (C.A.2 1932) (L. Hand, J.) ("Civilly of course the [mail fraud statute] would fail
22 without proof of damage, but that has no application to criminal liability."), cert.
23 denied, 286 U.S. 554, 52 S.Ct. 579, 76 L.Ed. 1289 (1932). By prohibiting the
"scheme to defraud," rather than the completed fraud, the elements of reliance and
damage would clearly be inconsistent with the statutes Congress enacted.

21 *Neder v. United States*, 527 U.S. 1, 24–25 (1999). While proof of the crimes requires that the
22 defendants' false statement must be material, "[t]his standard is not concerned with a statement's
23 subjective effect on the victim, but only the intrinsic capabilities of the false statement itself. . . .

1 For this reason [the Ninth Circuit has] held that misrepresentation may be material without
2 inducing any actual reliance.” *United States v. Lindsey*, 850 F.3d 1009, 1015 (9th Cir. 2017)
3 (internal quotations omitted). Thus, even if the Government did not prove that anyone relied on
4 the defendants’ misrepresentations, that does not result in an acquittal.

5 At the close of the trial, the jury was instructed on the mail fraud charges as follows:

6 Mr. Ritchie and Mr. Galecki are charged in Counts Ten, Eleven, Twelve, and
7 Thirteen of the Superseding Indictment with mail fraud in violation of Section
8 1341 of Title 18 of the United States Code. For you to find a defendant guilty of
that charge, the government must prove each of the following elements beyond a
reasonable doubt:

9 **First**, the defendant knowingly devised a scheme or plan to defraud, or a
10 scheme or plan for obtaining money or property by means of false or fraudulent
pretenses, representations, or promises;

11 **Second**, the statements made as part of the scheme were material; that is,
12 they had a natural tendency to influence, or were capable of influencing, a person
to part with money or property;

13 **Third**, Mr. Ritchie and Mr. Galecki acted with the intent to defraud; that
14 is, the intent to deceive or cheat; and

15 **Fourth**, Mr. Ritchie and Mr. Galecki used, or caused to be used, the mail
to carry out or attempt to carry out an essential part of the scheme.

16 In determining whether a scheme to defraud exists, you may consider not
17 only the defendant’s words and statements, but also the circumstances in which
they are used as a whole.

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19 ECF No. 448 at 36.² The jury could find that there was sufficient evidence to prove each of
20 these elements beyond a reasonable doubt. The defendants set up a plan to obtain money by
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22 ² The jury instruction for the wire fraud charges (Counts Fifteen through Nineteen) was nearly
23 identical, changing only the references to “the mail” to “an interstate wire communication.” See
ECF No. 448 at 39. The two related conspiracy charges (Counts Nine and Fourteen) used similar
language. *Id.* at 34, 37.

1 false representations about their products. They misrepresented what their products were
2 (“potpourri” or “herbal incense” instead of synthetic cannabinoid, also known as “spice”), that
3 their products were legal, and that the products were “not for human consumption.” They did
4 this in an attempt to skirt the relevant rules and statutes.

5 Zencense saleswoman Rachel Templeman testified that she had been instructed to not
6 refer to the product as “spice” but as “potpourri” or “herbal incense.” See Trial transcript of June
7 20, 2019 (Rachel Templeman testifying). The prepared script she used when speaking with
8 customers shows that the word “spice” was crossed out and she was to instead say “potpourri.”
9 *Id.* See also Trial Exhibit 59 (script). Templeman was to tell the customer “We carry a couple of
10 brands of spice [to be replaced by “potpourri”] product. Are you currently carrying anything like
11 that?” Trial Exh. 59. If the customer was not familiar with the product, she was to educate them
12 as follows:

13 **EDUCATION**

14 Spice [“potpourri”] is a great new product that is becoming very
15 popular. It’s an herbal incense blend that you burn. Do you sell
16 pipes?

17 **IF YES**

18 You know how pipes are for tobacco use only? Well, spice is not
19 for human consumption.

20 **IF NO**

21 What kind of stuff do you sell then? *<Most likely this will not be a
22 potential customer. If they are not the kind of store we want to sell
23 to, End call, mark “Not Interested,” explain in notes, and mark for
deletion.>*

24 *Id.* at 6. She also was instructed to represent that the products were legal:

1 **IF CONCERN IS LEGAL**

2 In our type of business we always need to be aware of what is
3 going on with the laws. I can tell you right now that this is legal in
4 your state or I wouldn't be calling you. We keep track of all that
 stuff here and, believe me, if there is a change in status we will be
 the first to let you know.

5 <Build rapport over a common enemy. Once they are comfortable,
6 continue.>

7 **IF CONCERN IS ETHICAL**

8 <Challenging someone's ethics can head downhill very fast and
9 there are other places out there that do sell it. End call
 congenially, explain in notes exactly what happened, mark "Not
 Interested," and mark for deletion.>

10 *Id.* at 4. A rational trier of fact could find that the defendants were not selling potpourri or herbal
11 incense, that they were selling spice intended to be smoked by the end user, and that their false
12 representations were capable of influencing customers to part with their money. 18 U.S.C. §
13 1341.³ "[V]iewing the evidence in the light most favorable to the prosecution, any rational trier
14 of fact could have found the essential elements of the [fraud charges] beyond a reasonable
15 doubt." *Alarcon-Simi*, 300 F.3d at 1176.

16 I have considered the other arguments and issues the defendants raise in the motion, and
17 none of them is sufficient to justify entry of a judgment of acquittal.⁴ The Government presented
18 sufficient evidence at trial to allow a rational trier of fact to find each essential element of each of
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21 ³ Even if reliance is required, Lindsey Schultz testified that she relied on the "does not contain"
22 reports Zencense sent her in connection with the product she ordered to "believe[] everything
 was legal." See Trial transcript of June 19, 2019 (Lindsey Schultz testifying).

23 ⁴ The defendants also raise some of these other arguments in their motion for a new trial (ECF
 No. 450), which I rejected in an order filed contemporaneously herewith. I incorporate that order
 here.

1 the charged crimes beyond a reasonable doubt. Reviewing the evidence under this standard, I
2 must deny the motion.

3 I ORDER that defendant Galecki's motion for judgment of acquittal (ECF No. 451) is
4 **denied.**

5 I FURTHER ORDER that defendant Ritchie's motion for joinder (ECF No. 461) is
6 **granted.**

7 DATED this 22nd day of November, 2019.

A handwritten signature in blue ink, appearing to read "Andrew P. Gordon", is written above the printed name.

9 ANDREW P. GORDON
10 UNITED STATES DISTRICT JUDGE
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